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OCTOBER TERM, 1990

JAMES C. PLEDGER, COMMISSIONER
OF REVENUES OF ARKANSAS,
Petitioner/Respondent,

v.

DANIEL L. MEDLOCK, *et al.*,
Respondents/Petitioners.

On Writ Of Certiorari To The Supreme Court Of Arkansas

BRIEF OF CENTURY COMMUNICATIONS CORP., *ET AL.* AS AMICI CURIAE IN SUPPORT OF PETITIONERS MEDLOCK, *ET AL.* IN CASE NO. 90-38

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INTEREST OF THE AMICI CURIAE

The Amici Curiae here, all of whom oppose the imposition by the State of Arkansas of the subject excise tax on cable television services, are trade associations representing cable television operators in their respective states or cable television operators. Together, the Amici represent cable television systems operating nationwide and serving more than ten million subscribing households.

The Amici will be vitally affected by the outcome of these consolidated cases. We support the petitioners

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* The Amici here also support respondents Medlock, *et al.* in Case No. 90-29.

Medlock, *et al.*, in Case No. 90-38 and respondents Medlock, *et al.* in Case No. 90-29, and urge that Section 26-52-301(3)(D)(i) of the Arkansas Code, as in effect January 1, 1990, be declared an unlawful abridgment of the freedom of speech and press. Amici further submit that the version of the subject tax provision immediately preceding the 1989 amendment (*i.e.*, the subject of the petition in Case No. 90-29) is likewise unconstitutional.

SUMMARY OF ARGUMENT

Communication over cable television lines is a function of Press and Speech falling within the protection of the First Amendment to the United States Constitution. Whether the communication consists of a picture or the proverbial thousand words, whether the delivery mode is paper boy, mail, radio wave or cable, and whether the publication is accessed by the consumer as hard copy or by video monitor, the activity is that of Speech and Press. It is, we respectfully submit, the *speaker/editor*, the *message*, the *distribution* and the *public's access*—indeed the breadth of this communicative activity—that are protected from governmental mischief.[1] This constitutionally guaranteed freedom, especially the bar on government's discrimination among press sources, is not related to or conditioned upon the particular medium chosen for mass-distribution of the protected publication.

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[1] *See, e.g., Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1976)("[W]here a speaker exists . . . the protection afforded is to the communication to its source and to its recipient"); *Griswold* v. *Connecticut*, 381 U.S. 479, 482 (1965)("The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute [and] the right to receive . . .").

That communications may be distributed among or accessed by the masses through a variety of technologies does not alter the principle that the *process* is fundamentally *one* of speech and press. It is the *process* that is intramurally foreclosed to governmental favor. Legislatively or judicially pigeonholding mass media communicators or publications in order to condone a facially discriminatory tax among the "press" ignores the command of the First Amendment.

ARGUMENT

THE DISPARATE TAXATION OF ALTERNATIVE MEDIA OF MASS COMMUNICATIONS IS AN UNCONSTITUTIONAL ABRIDGMENT OF THE FREEDOM OF SPEECH AND PRESS

At the heart of this case is the ruling by the Supreme Court of Arkansas that it is—

> unwilling to hold that all mass communications media must be taxed in the same way.

Medlock v. Pledger, 301 Ark. 483, 487, 785 S.W.2d 202, 204 (1990); Petitioner Medlock Appendix to certiorari petition 7(a).[2] The court below thus condones as consistent with the First Amendment to the United States Constitution the disparate taxation of competing vehicles of mass communications such as newspapers, magazines, broadcast stations, on the one hand, and cable television services on the other. The State supreme court justifies this scheme solely by categorizing the spectrum of mass media communi-

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[2] All record citations herein refer to the appendix to petitioner Medlock's petition for writ of certiorari, Case No. 90-38, hereafter identified as "Medlock Pet. App."

cators into subgroups consisting of those it perceives as "delivering substantially the same service." *Id.*[3] It is this fragmentation of the "press" to which Amici object. Subdividing the various vehicles of mass communications to accommodate uneven application of a tax on the press is without precedent in this Court.[4]

This is *not* a cable television "franchising" or "market entry" case in the style of *City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488, 495 (1986), involving "First Amendment values [to be] balanced against competing societal interests".[5] The "fact

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[3] Notably, the trial court below had found "that cable television system operators and subscribers are not entitled to claim the broader First Amendment Protected Rights afforded to the print media", because "cable television programming requires a cable systems use of public property, which along with the distinct and unique benefits gained by cable from use of that property, distinguishes for constitutional purposes cable television from other communications media." Medlock Pet. App. 19a. Of course, virtually all mass media businesses utilize "public property" in the distribution process. *E.g.*, *City of Lakewood* v. *Plain Dealer Pub. Co.*, 108 S. Ct. 2138 (1988) (coin operated distribution boxes on city streets). Cable systems pay substantial consideration for their use of public property. *E.g.*, 47 U.S.C. §§ 531 ("Cable Channels for Public, Educational or Governmental Use"), 542 ("Franchise Fees").

[4] Carrying the State supreme court's rationale to its logical conclusion would permit taxation of print or broadcast media and exemption of competitive cable TV media.

[5] *Preferred Communications* raised, but left undecided, issues regarding the permissible nature of a city's franchising powers and the extent to which local authorities might condition installation and operation of a cable television system over public streets. As the appellate court below stated, "those [franchising] cases involve regulation related to access or use of the rights of way rather than a tax which has no relationship to the ac-

that cable television uses public property and must obtain a[local] franchise to do so," 301 Ark. at 485, 785 S.W.2d at 203, Medlock Pet. App. 5a, was rejected by the appellate court below as justification for differential tax treatment of the respective media.

The issue presented here is whether the *discriminatory* application of the tax among competing organs of mass communications—particularly as such tax selectively falls on the public consumer of such product—violates the Constitution's guarantee of a free press.[6] This question is a refinement of that First Amendment issue left "undecided" by the Court in *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 222, 233 (1987), *i.e.*, "whether a distinction between different types of periodicals presents . . . [a] basis for invalidating the sales tax, as applied to the press".

The trial court found below that the Constitution's protection of the press is the special preserve of the print media. Medlock Pet. App. 19a ("the Court must conclude that cable television system operators and subscribers are not entitled to claim the broader First Amendment Protected Rights afforded to the print media"). In holding that the First Amendment's bar on "discriminatory taxation" pertains only "among the purveyors of a particular medium", 301 Ark. at 487, 785 S.W.2d at 204, Medlock Pet. App. 7a, the State supreme court unduly, and without warrant,

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quisition of the privilege of using public property." 301 Ark. at 485, 785 S.W.2d at 203, Petitioner Medlock App. 5a.

[6] Those First Amendment claims pressed here are obviously intertwined with interests arising under the Equal Protection Clause. *See, e.g., Police Dept. of Chicago* v. *Mosley*, 408 U.S. 92, 94-95 (1972).

dilutes the Constitution's protection of speech and press, thereby perpetuating the trial court's error.[7]

In Arkansas, "cable television" and "any and all other distribution of television, video, or radio services with or without the use of wires provided to subscribers or paying customers or users" are legislatively grouped, segregated from other mass media services, and subjected to an excise tax from which the others are explicitly exempt. Ark. Code Ann. §§ 26-52-301(3)(D)(i), 26-52-401(4) and (13) (Supp. 1989), Medlock Pet. App. 24a - 25a. Subscriptions by Arkansas residents for home-delivery of the *Little Rock Gazette*, the largest daily newspaper in the State, or *Good Housekeeping* are tax-exempt while subscription to the local cable TV service is taxed.[8] Within the range of available mass media offerings in Arkansas, the excise tax targets and financially burdens predominately those who elect to access cable media.[9]

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[7] Substantively distinguishing "press" rights on the basis of "a particular medium" is not unlike conditioning a speaker's right of expression on the technical specifications of the "soapbox".

[8] Under the taxing scheme at issue, residents of Arkansas choosing to obtain their news from local newspapers are favored over those relying upon, for example, Cable News Network or C-SPAN. That the former may physically be delivered to the home while the latter are transmitted over closed-circuit cable is not, we submit, a valid ground for *constitutional* distinction.

[9] The State of Arkansas is currently served by 252 cable television systems furnishing service to 437,992 subscribers. This represents 48.9 percent of the TV households in the State. Source: Warren Publishing, Inc., 58 *Television & Cable Factbook*, Cable & Services Volume, at C-386 (1990). Arkansas is not atypical of the U.S. It is generally estimated that approximately 55-

Accordingly, the tax unevenly affects not only the business of speech and press but also those citizens who may, for whatever reason, prefer to receive their news and entertainment through cable television services rather than from the local newspaper.[10] As this Court recognized in *City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986), a cable operator, "through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, seeks to communicate messages on a wide variety of topics and in a wide variety of formats".[11] The Court has consistently made it clear that the primary focus of the First Amendment is protection of the public. In *Red Lion Broadcasting Co.* v. *F.C.C.*, the Court said:

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60 percent of the TV households in the nation currently subscribe to cable television services. *Id.*

[10] A recently published national survey produced two findings demonstrating the consumers' dependence upon video transmissions as their source of news and information. Sixty-five percent of those surveyed stated that their primary source of news was "television" (including cable television) while only 42 percent indicated newspapers to be their primary source of news. Second, when asked to compare "regular" (broadcast) television with cable television, 33 percent stated that cable television provided better national news coverage while 11 percent stated that cable television provided better *local* news coverage than broadcast television. The Roper Organization, *The 1989 TIO/Roper Report* 14, 23, 27 (1989).

[11] That cable television is a full fledged "member" of the press is beyond question. Among the information sources currently available for publication via cable media are 69 programming networks distributed nationwide by satellite communication. Source: National Cable Television Association, *Cable Television Developments* at 7-A (Oct. 1990). Cable operators, in addition, typically originate programming for publication. *See also infra* note 18.

> It is the right of viewers and listeners, not the right of broadcasters, which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences . . . [and t]hat right may not constitutionally be abridged . . .

395 U.S. 367, 390 (1969).[12] When Arkansas, by affirmative law or exemption, substantively differentiates between mass media outlets and grants a preference to print publications as the source of "social, political, esthetic, moral and other ideas and experiences" *vis-a-vis* alternative organs because the latter communicate electronically, it unconstitutionally abridges "the right of the public" to access the media of choice.[13]

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[12] *See also National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943); *Columbia Broadcasting System* v. *Democratic National Committee*, 412 U.S. 94 (1973). These cases, along with *Red Lion*, provide the genesis of the so-called "scarcity doctrine."

[13] The scarcity doctrine, sometimes applied to justify a diminishment in the First Amendment rights of broadcast licensees, is a recognition of the practical disparity between the relative abilities of the broadcaster and the ordinary citizen to "speak." Its purpose is to impart some balance between the privileged licensee and the public. *Columbia Broadcasting System*, 412 U.S. at 101, 125 ("Unlike other media, broadcasting is subject to an inherent physical limitation . . . [and therefore a]ll who possess the . . . desire to communicate cannot be satisfactorily accommodated")("the public interest . . . requires periodic accountability on the part of those entrusted with the use of broadcast frequencies, scarce as they are"). The "periodic accountability" of the broadcast licensee, and the responsibility assumed to operate in the public interest, do not bear on the constitutional

Selectively taxing the *consumer* of mass communications, especially when the determinative factor is the "particular medium" of access, 301 Ark. at 487, 785 S.W.2d at 204, Medlock Pet. App. 7a, is analogous, if not identical, to that intra-press discrimination condemned as unconstitutional in *Minneapolis Star and Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) and *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 222 (1987). Although the tax in *Minneapolis Star* was not a "general sales tax", the Court's holding turned on the fact that the "ink and paper" tax unevenly burdened the press because it differentiated among publications based on governmentally-established criteria.[14] By contrast, the Arkansas tax is a "general tax". But the same defect that was adjudged constitutionally to invalidate the Minnesota statute is equally present in the Arkansas law. It is Arkansas' *exemption* of select media from the tax that creates the invidious discrimination among the press. Arkansas' scheme, like the unconstitutional tax at issue in *Minneapolis Star*, arbitrarily classifies the press in order to manufacture a distinction between its various components.

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obligation of the state to avoid uneven taxation of the press. *See also Bolger* v. *Young Drug Products Corp.*, 463 U.S. 60, 74 (1983)("Our decisions have recognized that the special interests of the Federal Government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication" (footnote omitted)).

[14] 460 U.S. 592-93 ("A tax that singles out the press or that targets individual publications within the press, places a heavy burden on the State to justify its action"). In this case, Arkansas proffers no "compelling" reason to justify its disparate taxation of mass media communicators and communications.

The State's highest court, appropriately recognizing below "that the press may be subjected to taxation but not if the tax is discriminatory", 301 Ark. at 486, 785 S.W.2d at 204, Medlock Pet. App. 6a, nonetheless approves the overt discrimination between the various vehicles of mass communications because it finds the respective press "classifications" at issue to be "dissimilar."[15] The result is that those speaking through print or broadcast media are distinguished from and preferred over those communicating via closed-circuit cable lines.[16] Likewise, those consumers electing to avail themselves of cable television service as an alternative, or even as a supplement, to delivery of the local newspaper, suffer the discriminatory effects of the contested tax.[17]

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[15] At least one state considered cable television sufficiently similar and competitive to newspapers that it prohibited "newspaper media and their affiliates" from obtaining a cable franchise in their "major circulation areas." Mass. Gen. L. ch. 166A, § 1(e) (1979).

[16] The motivation of the State to tax certain media and to relieve others, if indeed there be any motive at all, "is not the *sine qua non* of a violation of the First Amendment". *Minneapolis Star and Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983). Whether the newspaper/magazine/broadcast lobby in the State may have sufficient political clout to persuade the legislature to exempt their product from the tax is therefore irrelevant. It is the uneven treatment between components of the press, and the failure of the State to meet its "heavy burden" of justification, *ante* note 14, that is *per se* unconstitutional. *Id.* at 591-2.

[17] *See, e.g.*, *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390, 399-400 (1968); *Teleprompter Corp.* v. *C.B.S., Inc.*, 415 U.S. 394, 408 (1974). Today, of course, cable systems offer substantially more than enhanced reception of broadcast signals.

Indeed, in rural areas, some residents may be motivated to subscribe to cable services to enable, or technically enhance, reception of those broadcast services freely available off-the-air in the more populous regions.[18] Electronically published communications are not constitutionally inferior (or superior) to those distributed via print media. Likewise, public consumers accessing the electronic press are not properly the objects of tax discrimination *vis-a-vis* those who choose the medium of print. It is not the role of Government selectively to promote or endorse one media outlet over another.

Seventeen years ago, well before the advent of cable television distribution of satellite communications—the single most significant development resulting in the explosion of electronic publishing—a justice of this Court said:

> My conclusion is that TV and radio stand in the same protected position under the First Amendment as do newspapers and magazines. The philosophy of the First Amendment requires that result, for the fear that Madison and Jefferson had of government intrusion is perhaps even more relevant to TV and radio than it is to newspapers and other like publications.

Columbia Broadcasting System, Inc. v. *Democratic National Committee*, 412 U.S. 94, 148 (1973)(Douglas, J., concurring).[19] It is this principle that the judg-

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[18] Thus, those cable subscribers disadvantageously located in a geographical sense are further penalized by the State's selective tax on their reception of broadcast communications.

[19] Two cable systems, one in Vero Beach, Florida and the other

ments below fundamentally dispute. Both lower courts would subordinate the cable publisher/editor, as well as the consumer of such media services, to second-class status under the First Amendment. Each is satisfied that the State may overtly discriminate in taxing print and electronic media. Each is of the view that the electronically published press is *constitutionally* different from and inferior to the print media.

This is, we respectfully reiterate, not a case involving the powers of local government to franchise or regulate cable television. Neither is it a facial challenge to the authority of government to tax communications media. Rather, the issue presented is whether those mass media communications electronically published, and the providers/consumers of such press, hold a lesser stature under the Speech and Press Clause of the First Amendment than that afforded print media.

By taxing only designated distribution technologies of mass communications and exempting other competitive media, Arkansas' excise tax facially favors select elements of the press to the direct prejudice of others and is therefore unconstitutional.

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in Jackson, Mississippi, were the first to furnish subscribers with programming distributed via communications satellite. The date was October 1, 1975 and the inaugural program was the "Thrilla From Manilla", the live Heavyweight Championship Fight between Muhammad Ali and Joe Frazier. Today, nearly all the nation's 6,000 cable systems offer a diverse menu of satellite-provided cable networks plus a mix of locally originated programming. Clearly, the information transmitted over the typical cable system matches or exceeds that contained in the pages of even the largest newspapers. *See ante* notes 10 and 11.

CONCLUSION

Arkansas' current scheme of taxation of communications media discriminates among elements of the press thereby unconstitutionally abridging rights protected under the First Amendment.

Respectfully submitted,

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